

FROM THE COMMITTEE ON MODEL CIVIL JURY INSTRUCTIONS

The Committee solicits comment on the following proposals by January 8, 2016. Comments may be sent in writing to Timothy J. Raubinger, Reporter, Committee on Model Civil Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCJI@courts.mi.gov.

PROPOSED

The Committee is considering the adoption of amended instructions to reflect the decision in *Obergefell v Hodges*, ___ US ___; 135 S Ct 2584; 192 L Ed 609 (2015).

M Civ JI 52.01 Measure of Damages—Injury to Spouse

In this case [*name of derivative plaintiff*] is claiming that [he / she] sustained damages as a result of injury to [~~his wife / her husband~~ his / her spouse]. If you find that [*name of principal plaintiff*] [is / would be] entitled to damages, then it is your duty to determine the amount of money which will reasonably, fairly and adequately compensate [*name of derivative plaintiff*] for any of the following elements of damage [he / she] has sustained to the present time as a result of injury to [~~his wife / her husband~~ his / her spouse].

(a) *(the reasonable expense of necessary medical care, treatment and services received by [~~his wife / her husband~~ his / her spouse]

(b) *(the reasonable value of the services of [~~his wife / her husband~~ his / her spouse] of which [he / she] has been deprived)

(c) *(the reasonable value of the society, companionship and sexual relationship with [~~his wife / her husband~~ his / her spouse] of which [he / she] has been deprived)

You should also include the amount of money that will compensate [*name of derivative plaintiff*] for such of these elements of damage as you decide are reasonably certain to be sustained in the future. If any element is of a continuing nature, you shall decide how long it may continue. †(If an element of damage is permanent in nature, then you shall decide how long [*name of derivative plaintiff*] and [~~his wife / her husband~~ his / her spouse] are each likely to live and how long the plaintiff is likely to sustain that element of damage.)

Which, if any, of these elements of damage have been proved is for you to decide based upon evidence and not upon speculation, guess or conjecture. The amount of money to be awarded for certain of these elements of damage cannot be proved in a precise dollar amount.

The law leaves such amount to your sound judgment. Your verdict must be solely to compensate [*name of derivative plaintiff*] and not to punish the defendant.

Note on Use

*Complete this instruction by selecting the appropriate element or elements of damages, as shown by the evidence, from the three clauses in parentheses. The appropriate phrases in brackets should also be given as part of the instruction.

†The sentence in parentheses should be given if appropriate.

This instruction must be modified if there has been a divorce or other event which would end the right to consortium damages.

Comment

A husband may recover for necessary medical expense incurred as a result of injury to his wife. *Burns v Van Buren Twp*, 218 Mich 44; 187 NW 278 (1922); *Laskowski v People's Ice Co*, 203 Mich 186; 168 NW 940 (1918). He may also recover the reasonable value of the loss of his wife's ability to carry on her services and housework. *Leeds v Masha*, 328 Mich 137; 43 NW2d 92 (1950); *Burns*.

Both the husband and wife have a right to recover for the loss of consortium. See *Montgomery v Stephan*, 359 Mich 33; 101 NW2d 227 (1960).

The no-fault law has not abolished the common-law action for loss of consortium by the spouse of a person who receives above threshold injuries, *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502; 309 NW2d 163 (1981); nor is a consortium action precluded by the Michigan Civil Rights Act, MCL 37.2101 et seq.; *Eide v Kelsey-Hayes Co*, 431 Mich 26; 427 NW2d 488 (1988).

See *Morse v Deschaine*, 13 Mich App 101, 107; 163 NW2d 693, 696 (1968), for a discussion of situations in which a wife may sue in her own right for her medical expenses.

History

M Civ JI 52.01 was SJI 33.00.

M Civ JI 175.11 Omission of Spouse in Will As a Result of Oversight or Mistake

Caution: *The instructions in this chapter should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(a), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.*

The law provides that if a decedent fails to provide in [his / her] will for [~~his wife / her husband~~ his / her spouse], and if it appears that the omission was as a result of oversight or mistake, [~~his wife / her husband~~ his / her spouse] is entitled to the same

share of the decedent's estate that [he / she] would have received if the decedent died without a will.

The petitioner has the burden of proving that the omission of [~~name of wife / name of husband~~ name of spouse] from the will of [*name of decedent*] was as a result of oversight or mistake.

You must determine whether the omission was as a result of oversight or mistake. In making this determination you may consider the provisions of the will and all of the surrounding circumstances.

Note on Use

Caution: This instruction should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

Comment

See MCL 700.126(2).

History

M Civ JI 175.11 was added February 1986.

M Civ JI 175.12 Omission of Spouse in Will Made Prior to Marriage Where There Are Transfers Made in Lieu of Will Provision

The law provides that if a decedent fails to provide for [~~his wife / her husband~~ his / her spouse] to whom [he / she] was married after the execution of decedent's will, the [wife / husband] shall receive the same share of the decedent's estate that [he / she] would have received if the decedent died without a will, unless the decedent provided for [~~his wife / her husband~~ his / her spouse] by transfers of property that were outside the will, which the decedent intended to be instead of provisions for [~~his wife / her husband~~ his / her spouse] in [his / her] will.

The petitioner has the burden of proving that [*name of decedent*] failed to provide for [*name of spouse*] by transfer of property outside the will, or that [*name of decedent*] did not intend [that transfer / those transfers] to be instead of provisions in [his / her] will.

You must determine whether the decedent provided for [his / her] spouse by transfer of property outside the will and whether decedent intended [that transfer / those transfers] to be instead of provisions in [his / her] will. In making this determination, you may take into consideration all of the surrounding circumstances.

Note on Use

Caution: This instruction should be used only for estates of decedents dying before April 1, 2000, the effective date of the Estates and Protected Individuals Code (EPIC). MCL 700.8101(1), (2)(a). See the instructions in chapter 178 for estates of decedents dying on or after April 1, 2000.

For estates of decedents dying before April 1, 2000, this instruction should not be used if the court determines from the will itself that the omission of the spouse was intentional. MCL 700.126(1).

Comment

See MCL 700.126(1).

See *In re Cole Estate*, 120 Mich App 539; 328 NW2d 76 (1982).

History

M Civ JI 175.12 was added February 1986.

M Civ JI 178.12 Pretermitted Spouse: Will Executed Prior to Marriage (EPIC)

The law provides that a surviving spouse who married [~~her husband / his wife~~ his / her spouse] after the [~~husband / wife~~ spouse] executed [his / her] will is entitled to a certain share of the deceased [~~husband / wife~~ spouse]'s estate. However, the surviving spouse is not entitled to this share of decedent's estate if:

*(a) the will was made in contemplation of the marriage, (or))

*(b) the will expresses decedent's intention that it is to be effective despite a marriage after the will is made, (or))

*(c) the decedent provided for [~~his wife / her husband~~ his / her spouse] by transfer of property outside the will and intended the transfer to substitute for provision for [~~his wife / her husband~~ his / her spouse] in [his / her] will.)

In this case, the share of [*name of decedent*]'s estate that [*name of surviving spouse*] would receive is the same share as [she / he] would have received if [~~her husband / his wife~~ his / her spouse] died without a will ******(except that [she / he] may not receive any part of the estate held in trust for the benefit of, or set aside by or passing under the will to [*name(s) of decedent's child / children born prior to the decedent's marriage to the surviving spouse but not the surviving spouse's child/children, or name(s) of descendant of decedent's child / children*]).

The respondent has the burden of proving (any of) the following:

*(a) the will was made in contemplation of the marriage, (or))

*(b) the will expresses an intention of [*name of decedent*] that it is to be effective despite a marriage after the will is made, (or))

*(c) [*name of decedent*] *******(provided for [*name of surviving spouse*] by transfer of property outside the will, and) intended that the transfer of property outside the will substitute for provision for [~~his wife / her husband~~ his / her spouse] in [his / her] will.)

You must determine whether respondent has met [his / her] burden of proof.

The Court will furnish a Special Verdict Form to assist you in your duties. Your answers to the questions in the Special Verdict Form will provide the basis on which this case will be resolved.

Note on Use

*The Court should delete any subsection that is not an issue in the case. Subsection b. should be deleted if the will is not ambiguous and there is no issue for the jury.

** This phrase should be read to the jury if there is part of the estate that the surviving spouse is not eligible to share. See MCL 700.2301(1)(a)-(c). The provision of EPIC that sets forth the share of the estate allotted to a pretermitted spouse is reproduced in the Introduction to this chapter.

***If the parties do not dispute the transfer or transfers of property outside the will, the Court should delete this first part of subsection (c).

The will or other evidence may be used to show that the will was made in contemplation of the marriage; decedent's intent to substitute transfers outside the will may be shown by his or her statements or reasonably inferred from the amount of the transfer or other evidence. MCL 700.2301(2)(a), (c).

EPIC states one of the grounds for denying pretermitted spouse status as: “The will expresses the intention that it is to be effective notwithstanding a subsequent marriage.” MCL 700.2301(2)(b). For cases construing a similar provision in prior law, see the comment to M Civ JI 178.02 Pretermitted Child: Will Executed Prior to Birth or Adoption of Child Omitted from Will (EPIC).

The spouse claiming under MCL 700.2301 must show that he or she is the surviving spouse and that he or she married the testator after the will was executed. If either of these present issues of fact, this instruction must be modified.

MCL 700.2301 is taken almost verbatim from the 1990 version of the Uniform Probate Code (UPC) §2-301. The UPC comment explains that the moving party has the burden of proof on the exceptions contained in subsections (a)(1), (2), and (3) (numbered (2) (a), (b), and (c) in the Michigan statute).

Comment

MCL 700.2301.

The pretermitted spouse section of EPIC departs substantially from prior law. First, EPIC discards the requirement that to claim pretermitted status, the surviving spouse needs to be omitted from the will altogether. Second, under EPIC, only a spouse who married the testator after the will was executed may claim as a pretermitted spouse. Prior law permitted any surviving spouse to make a claim if his or her omission from the will was based on “oversight or mistake.” Third, EPIC eliminates “oversight or mistake” as specific grounds for a claim as a pretermitted spouse.

Under prior law, where decedent’s will made prior to marriage to the surviving spouse made a bequest to her as “a friend,” the spouse did not meet the statutory definition of an “omitted spouse” for whom the “testator fails to provide by will” even though decedent may not have contemplated the marriage when the will was made. *In re Estate of Herbach*, 230 Mich App 276, 284, 287; 583 NW2d 541 (1998). The EPIC revision changes this result. Under EPIC, a surviving spouse who married the testator after the will was executed may claim a share as a pretermitted spouse even if he or she receives some bequest in the will unless it appears from the will or other evidence that the will was made in contemplation of the marriage, or the will indicates it is to be effective despite a subsequent marriage, or transfers outside the will are intended to substitute for a testamentary provision.

Two pre-EPIC cases involved transfers outside the will to surviving spouses: *In re Cole Estate*, 120 Mich App 539; 328 NW2d 76 (1982), and *Noble v Mc Nerney*, 165 Mich App 586; 419 NW2d 424 (1988). In both cases, the appellate court affirmed trial court findings that the decedent did not intend any of the transfers to substitute for a testamentary disposition for the spouse. The Michigan Court of Appeals also held in *Cole* that a widow’s right to elect a statutory share under MCL 700.282(1) (now MCL 700.2201) did not waive her right to claim a share of the estate as a pretermitted spouse.

History

M Civ JI 178.12 was added April 1, 2002. Amended July 2012.

M Civ JI 228.12 Form of Verdict: Pretermitted Spouse: Will Executed Prior to Marriage (EPIC)

We, the jury, make the following answers to the questions submitted by the Court:

QUESTION NO. 1: Was [*name of decedent*]'s will made in contemplation of [his / her] marriage to [*name of surviving spouse*]?

Answer: ____ (yes or no)

QUESTION NO. 2: Does [*name of decedent*]'s will express [his / her] intention that it is to be effective despite a marriage after the will is made?

Answer: ____ (yes or no)

QUESTION NO. 3: Did [*name of decedent*] provide for [*name of surviving spouse*] by transfer of property outside the will?

Answer: ____ (yes or no)

If your answer is "no," do not answer QUESTION NO. 4.

QUESTION NO. 4: Did [*name of decedent*] intend that the transfer of property outside the will substitute for provision for [~~his wife / her husband~~ his / her spouse] in [his / her] will?

Answer: ____ (yes or no)

Note on Use

*The Court should delete any question that is not an issue in the case.

History

M Civ JI 228.12 was added April 1, 2002.